Supreme Court, U.S.
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No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: RANDALL S. GOULDING

On Petition For Issuance of a Writ of Mandamus
To The Court of Appeals For The Seventh Circuit
Since The Conviction Resulted From:
(1) IRS Agent Evidence Tampering,
(2) Third-party Contacts Made by Justice Cummings,
(3) Seventh Circuit's Cover-up of Doctored Evidence And IRS Agent Fraud,
(4) Seventh Circuit's Opinions Imbued With Patently False *Factual* Conclusions, Designed to Preclude Review.

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GOOP

INTRODUCTORY STATEMENT

Petitioner's defense included good faith and invidious initiation of an undercover sting operation - that the criminal investigation and consequent prosecution would not have occurred but for his speaking out against IRS agents and his civil rights suit. Since the trial and the conviction, Petitioner:

> uncovered IRS agent evidence-tampering concerning the very undercover audio and video tapes which were the *sine qua non* of the conviction (Appendix E).
>
> discovered that the senior panel member in the original appeal made third party, extra-judicial, off-the-record contacts (Appendix F).
>
> secured from the government previously withheld, exculpatory evidence, including evidence:
>
> > that Goulding was unaware of the very reporting requirement for which he was convicted of not observing,
> >
> > that the IRS had admittedly engaged in illegal secret surveillance of Goulding, prior to any criminal investigation, and
> >
> > that the mysteriously missing yellow sheet of paper which the IRS alleges to have lost, the cornerstone of the government's case, in fact, never existed.
>
> uncovered a previously concealed under oath admission to surreptitious contacts of Goulding's clients with special inducements to fire Goulding as their lawyer (June 2, 1994 Order Taking Judicial Notice of Feinglass's statement) - while IRS Agent Feinglass rendered a contrary Affidavit in order to cause the dismissal of Goulding's Civil Rights Suit

and to facilitate the denial of Goulding's Motion for Discovery in this criminal matter. (Appendix G).

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Seventh Circuit abused its discretion when it engaged in the following conduct, and if so, whether such abuse of discretion warrants this Court's rarely exercised mandamus powers:

a. The Seventh Circuit's opinions conspicuously omit the fact that the conviction resulted from evidence tampering by IRS Agents (An Audio Engineer examined the tapes with a newly discovered audio analysis, concluding that tampering occurred. Appendix E);

b. Justice Cummings' made secret third-party, extra-judicial, contacts (Appendix F);

c. The Seventh Circuit ignored and covered-up *doctored* evidence, causing the erosion of important legal doctrines effectively eradicated by the Seventh Circuit's implementation of what may be termed "rug immunity." - "Rug immunity" is the judiciary's cover-up of illegal government activities (including here, a sinister government plot, admitted to, under oath, by IRS Agent Feinglass, and courageously disclosed by a government official - IRS agents and attorneys made special offers to Goulding's clients: tax incentives to induce his clients to fire him as their attorney and to alter their testimony (Appendix G)), thus immunizing government officials from the burdens of their illegality, while simultaneously destroying fundamental and long-standing traditional constitutional protections (including here, the First, Fifth and Sixth Amendments to the United States Constitution, and concealment of IRS misconduct and vindictiveness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)), and undermining more liberal and constitutionally friendly pronouncements of this Court; and

d. The Seventh Circuit's opinions were so imbued with patently

false factual conclusions and gross factual inaccuracies, that the only rational explanation is a design to preclude any review by *certiorari*, obscuring significant legal issues through such false factual portrayals?

PARTIES

Randall S. Goulding is the only party seeking relief.

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PRAYER FOR RELIEF

Petitioner Randall S. Goulding, *pro se,* respectfully prays that a writ of mandamus issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF JURISDICTION AND OPINIONS BELOW

Jurisdiction for this matter arises under 28 U.S.C. §1651. The Court of Appeals order for which mandamus is sought (denying Petitioner's Motion for Leave to file a second 28 U.S.C. § 2255 Petition) is unpublished, attached as Appendix A. The Court of Appeals' order denying the motion for Rehearing is attached as Appendix B. The Court of Appeals' opinion affirming the denial of Petitioner's first 28 U.S.C. § 2255 Petition, also unpublished, is attached as Appendix C. The District Court opinion denying Petitioner's first 28 U.S.C. § 2255 Petition, also unpublished, is attached to this petition as Appendix D. The opinion denying Petitioner relief on direct appeal is published at 26 F.3d 656.

REASONS FOR GRANTING THE WRIT

Now evident is a clear pattern of abuse - IRS illegality and potential for vindictive and retaliatory criminal investigation and prosecution, due to Goulding's civil rights suit. Also now uncovered - IRS agent evidence-tampering. But, IRS agents presented false affidavits to avoid implications of their illegal conduct. Perpetrators of frauds should not be entitled to benefit therefrom merely because their frauds were not previously susceptible to discovery. The Seventh Circuit's interpretation of Circuit Court Rule 22.2(a)(1) to the contrary, effectively precluding relief unless the victim fortuitously discovers the fraud earlier[1], offends and undermines Fifth

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[1]For example: conspicuously absent from the Seventh Circuit's opinion: IRS agents and attorneys made special offers to Goulding's clients: tax incentives to induce his clients to fire him as their attorney and to alter their testimony. On April 19, 1994, IRS attorney Ratchford courageously disclosed (after which he was immediately removed from the case) excerpts of an internal, secret IRS memorandum of an interview, under oath, of IRS Agent Feinglass (a defendant in Goulding's Civil Rights Action), admitting to this practice, originally denied by the IRS in order to fraudulently secure favorable rulings, including on its motion in *limine* in this case. Among other things, Goulding was prevented from demonstrating to the jury, bias of

Amendment due process, Sixth Amendment right to confrontation and *Brady v. Maryland.*

The Seventh Circuit's opinions and *ex-parte* activities collectively, if left alone, would undermine public confidence in the outcome and in the appellate process. Such exceptional circumstances warrant the relief here sought. Relief is not available from any other court or from any other source. A kinder gentler government would be good, but honest government is essential to a free society.

Any reluctance to exercise mandamus powers should be tempered with the recognition that Goulding is innocent! It is a particularly sad commentary on a judicial system which here refused opportunity after opportunity to determine guilt or innocence; refusing on each occasion to expose IRS corruption. It is most unfortunate that the Seventh Circuit consistently adopts the government's position and avoids disclosing IRS wrongdoing in the face of proven and even admitted, withheld evidence of IRS corruption. So much for the proposition, long lost in the archives of the Seventh Circuit, that "It is better that a guilty man go free than to convict an innocent man."

SUMMARY OF THE ARGUMENTS

The Seventh Circuit abused its discretion, refusing to grant a hearing upon uncovering of IRS agent evidence-tampering of the very undercover audio and video tapes resulting in the conviction; these tapes were the *sine qua non* of the conviction. -- An Audio Engineer identified three distinct patterns or indicia of tampering in the very tapes which IRS agents characterized in their testimony as involving "accidental" erasures and failure to turn on the tape recorder[2]. Any reasonably prudent judicial body would permit an examination of the original tapes, still in the IRS's carefully guarded possession.

Additionally, the Seventh Circuit's senior panel member in the

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agents, fellow employees of those who testified at trial. Appendix G.

[2]Conceptually, this is not dissimilar to the DNA testing which resulted in the recent freeing of so many wrongfully convicted of rape.

original appeal made third party, extra-judicial, off-the-record contacts in a matter marred with an abundance of IRS misconduct, some of which was even admitted. Newly discovered, withheld, exculpatory evidence, includes evidence:

> that Goulding was unaware of the very reporting requirement for which he was convicted of not observing,
>
> that the IRS admitted to an illegal secret surveillance of Goulding, prior to any criminal investigation, and
>
> that the mysteriously missing yellow sheet of paper which the government alleges to have lost, the cornerstone of the government's case, never existed.

This withheld evidence, previously denied by IRS agents, should have been available for cross examination. Its absence prevented Goulding from cross-examining or developing the bias of the agents who testified at trial, thus infringing upon his Sixth Amendment right to confrontation, as well as Fifth Amendment due process and *Brady v. Maryland*. The IRS's failure to turn over this evidence and its false denial of its existence also facilitated the trial court's denial of Goulding's Motion to Dismiss for Governmental Vindictiveness. Finally, the overwhelming evidence now clearly establishes an IRS agent conspiracy, including the illegal coverup using false affidavits, defrauding Congress, the Seventh Circuit and the trial court.

STATEMENT OF THE CASE

a. *Procedural History*. Petitioner Randall Goulding and co-defendant Michael Ushijima, both Illinois practicing attorneys, were charged in an eighteen-count indictment: one count of conspiracy to defraud (18 U.S.C. § 371), two counts of failure to report the transportation of monetary instruments (31 U.S.C. § 5316) and 15 counts of mail fraud (18 U.S.C. § 1341). They were convicted in a jury trial before the Hon. James B. Moran, Chief Judge of the District Court for the Northern District of Illinois. Goulding was sentenced to six months imprisonment, restitution, community service, and a five-year term of probation. The Seventh Circuit

affirmed on May 25, 1994 and denied Petitions for rehearing, June 20, 1994. *Certiorari* was denied. Goulding's first 28 U.S.C. § 2255 petition was denied December 5, 1994, affirmed on appeal and *certiorari* denied. In December 1999, the Seventh Circuit denied Goulding's petition to file a second 28 U.S.C. § 2255 petition. The instant Petition For Issuance of a Writ of *Mandamus*, seeks relief from that and/or other Seventh Circuit actions in this case.

b. *History of Proceedings*. The IRS investigation included a 1986 and 1987 undercover sting operation. Years later, in May 1991, Goulding was indicted. In June 1992, he was convicted of all eighteen counts. Michael Ushijima, an attorney specializing in international transactions, who Goulding hired, was also convicted.

c. *Excluded Evidence*. Responding to IRS Agent abuses, Goulding, filed a Civil Rights Suit. Immediately thereafter, the defendant Agents initiated the criminal investigation which prompted the undercover sting, the indictment and the conviction. The trial court granted the government's motion *in limine*, prohibiting any reference to the Civil Rights Suit. The jury was not aware of agent animosity and witnesses' bias against Goulding.

FACTS - PRECIPITATING THE STING OPERATION: THE APPEARANCE OF RETALIATION FOR GOULDING'S EXERCISE OF FIRST AMENDMENT AND OTHER STATUTORY RIGHTS.

The criminal investigation, as well as several additional penal measures, followed soon after Goulding filed his civil rights suit. Both of Goulding's civil rights lawyers were also targeted for a Grand Jury Investigation after filing the civil rights suit (Doc. 143, Ex. C[3]). According to the unrebutted affidavit of Howard Emirhanian, retired IRS Special Agent, insufficient investigative reasons existed to commence an undercover sting operation. He further opined that investigative reasons to continue the undercover

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[3]Such references pertain to the criminal trial document number. "CR" refers to the transcript page number in the criminal trial.

sting operation beyond the initial, December 18, 1986 undercover meeting were insufficient (Doc. 89). No charges were brought as a result of any activity by Goulding or his associates, other than from the undercover sting operation (Doc. 143, Ex. C). No evidence exists that Goulding ever before participated in any effort to aid a client's overseas cash transfer, either before or after the undercover sting operation (Doc. 89 ¶¶ 8-12). The charges were obscure, *mala prohibitum*, not *mala in se*.

Dietz and Feinglass, the IRS Agents Goulding sued, have a reputation for vindictiveness (Doc. 143, App. C, Affidavits). While IRS Agent Feinglass rendered a contrary affidavit in order to cause the dismissal of Goulding's Civil Rights Suit and to facilitate the denial of Goulding's Motion for Discovery, the IRS concealed Feinglass's under oath admission to surreptitious contacts of Goulding's clients with special inducements to fire Goulding as their lawyer (June 2, 1994 Order Taking Judicial Notice of Feinglass's statement - Appendix G). The IRS continued to cover-up and refuse to divulge or disclose the Criminal Investigation Referral Reports, despite the foregoing indicia of vindictiveness and two (2) court orders which required production (which were thereafter vacated, despite finding the requisite "colorable basis" for the defense).

The prosecution, during closing argument, made numerous false statements, many going to the very heart of the defense. At least one was repeated even following defense objection (Doc. 143, Ex. B and Doc. 161). Twice, the prosecutors falsely told the jury that Goulding actually admitted that Goulding was "breaking the law."

The criminal investigation and therefore the sting and the prosecution would not have occurred but for Goulding's civil rights suit. Nor has the government ever denied that the suit prompted the referral, the criminal investigation and thus, the prosecution.

d. *Evidence at Trial* - The Sting Operation. The undercover agent (UCA), introduced to Goulding by a former client (Evegelatos), expressly sought Goulding's confidential advice and legal assistance in investing his *past* "gambling" money and other *past* "unreported

income." The UCA indicated a business need for a corporation in the Cayman Islands (12/18/86, pp.11-14; 2/24/87, pp.28,29,50,66; 5/19/87, p.42) and that his monetary accumulations were from *prior* years - some from a *past* crime. None involved ongoing or contemplated future criminal activity (CR 494-692). Except for the prosecution's closing argument, there is very little dispute as to the facts, nearly all of which is on audio or video tape[4].

In the government's attempt to establish intent and/or predisposition, James Evegelatos, an admitted life long - "cheat and a con man" (CR.178), testified that years earlier Goulding prepared a flow chart on yellow paper, which was among the several boxes of documents the IRS took from his possession. Agent Hejza testified that he saw the "missing" yellow sheet of paper, but never photocopied or took such paper, among the documents he obtained.

The only "hard evidence" of predisposition, this yellow sheet of paper, was the cornerstone of the government's case. Yet, it was never produced at trial; the IRS claims it was lost. This document also was never before mentioned in any document or testimony, until trial, just two months after the decision in *U.S. v. Jacobson*, 503 U.S. 540 (1992), holding that the government must have evidence of predisposition toward criminality before first subjecting one to a sting. It was not mentioned in any statement by Evegelatos. It was not mentioned in Agent Hejza's memorandum of interview of Evegelatos. It was not mentioned in Hejza's grand jury testimony. It was not mentioned in Hejza's affidavit in opposition to Goulding's Motion to Dismiss. It was not mentioned in any of the numerous briefs in opposition to Goulding's Motion to Dismiss, for Discovery or for reconsideration of the Discovery. It was not mentioned in response to the unrebutted Emirhanian Affidavit (Doc. 89), concluding that there were insufficient investigative reasons to imitate the sting operation or to continue it beyond the first meeting. It appeared only once its need became evident, shortly after *Jacobson* was argued before this Court, clarifying the need for

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[4]It was only recently discovered that this evidence was compromised, per the report of an audio engineer, using technology invented since the trial.

evidence of predisposition.

Since this was not Goulding's area of expertise, he hired Ushijima, paying him ½ of the $5,000 retainer. Both billed only at their normal billing rates. Ushijima testified that his responsibilities included foreign transactions and that Goulding twice told him to make sure everything was done legally. He testified that before boarding the airplane on February 7, 1987, he divided up the UCA's $30,000 among the five individuals with whom he traveled, so that no one person carried more than $10,000, so as to legally avoid the *declaration* requirement (Form 6059-B). Several of the people traveling with Ushijima corroborated his testimony. There was no evidence that either defendant knew of the separate *reporting* requirement (Form 4790) for which they were prosecuted. Nor did the government make any attempt to bring it to their attention before prosecuting. Throughout the undercover operation the UCA referred only to "the form on the plane," which is the customs declaration form, not the Form 4790 for which the penal provisions apply and for which defendants were prosecuted.

The UCA wanted to make investments with cash, some of which was excluded from prior tax returns (12/18/86, pp. 12, 14). Goulding advised -- file an amended return and pay the tax. The UCA countered with his desire to avoid his ex-wife's discovery of his cash horde and to avoid incrimination. Defendants recommended incorporation to insulate the UCA from personal liability for the UCA's intended acquisition of a "bowling alley ... restaurant [and] liquor license" (2/24/87, pp. 50, 58, 66; 5/19/87, p. 42). At 2/24/87, pp. 28, 29, Ushijima stated:

> a business operation like a bowling alley ... a restaurant have a lot of liabilities ... you want to isolate that in a company.... You don't want that real estate subjected to a guy slipping in a bowling alley or eating bad food ... advising a client who wanted to, ah, buy and own and operate a bowling alley/restaurant, wouldn't you incorporate the bowling alley and the restaurant separately? [Y]ou'd have two separate corporations ... there may be three.... That's only good business practice.

Only after Evegelatos' suggestion and *following* the first two of six different admonitions that the UCA file amended returns (12/18/86, p. 13, 15, 26, 35; 02/06/87, p. 11; 03/05/87, p. 12), and after the UCA expressed investment desires requiring a corporation, did Goulding advise him to incorporate, but that a domestic incorporation would incriminate him. Only then did Goulding suggest *that the UCA* himself could bring the money to the Cayman Islands and form his corporation there (12/18/86, pp. 11-15).

On February 7, 1987, the UCA informed Goulding that some of the funds were illegal gambling proceeds which he had not reported on his income tax returns. He assured Goulding that no portion was from drugs and that he was no longer involved in gambling; Goulding advised the UCA as to the wisdom of abandoning his purported illegal activities (2/6/87, p. 4).[5]

Given the likelihood of an incriminating disclosure arising out of a domestic incorporation and capitalization for the UCA's contemplated business acquisitions, coupled with the UCA's other articulated secrecy needs (including as to his ex-wife), Ushijima formed the corporation in Grand Cayman (12/18/88, pp. 11-15; 2/24/87, pp. 28, 29). To account for the UCA's transfer of funds from the Cayman corporation to the Minnesota subsidiary, Goulding prepared promissory notes, requiring repayment.

Goulding also advised the UCA that tax returns should be filed where required (12/18/86, pp26, 27, 39; 2/24/87, pp 30, 32, 51; 5/19/87, pp 32, 43); and to pay taxes on money brought into the United States (2/6/87, p 11; 5/19/87, pp37, 38, 40, 42, 43). Goulding advised the UCA not to stop filing Income Tax returns, despite the UCA's contrary suggestion (5/19/87, p34). Goulding advised him that current income, even if earned abroad, was taxable and should be included on his tax return (12/18/86, pp 26, 27, 39; 2/6/87, p 11; 5/19/87, pp 32, 37, 38, 40, 42). Goulding advised that tax shelters

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[5]Both defendants queried the UCA as to the possibility of the cash being drug-related. However, the UCA consistently denied drug activities (12/18/86, pp. 37, 62; 2/6/87, p. 8; 5/8/87, p. 3).

(Goulding's area of expertise) would not provide the UCA with any substantial tax benefit in 1986, being so late in the year (12/18/86, pp 54-55), refusing to facilitate an erroneous tax benefit.

Ushijima testified that at all times during this transaction, he believed their actions to be legal. No current funds on which taxes were due were involved; no contemplated current or ongoing criminal activities were stated by the UCA. Ushijima was aware of a specific Supreme Court case which held the prior filing of a false tax return was not an ongoing crime. Any crime which had occurred in the past by failing to declare the income was completed at the time the false return was filed in the prior year. Any further dealing with undeclared funds on which taxes were not paid was not another crime (CR. 719). Ushijima was unaware of a "declaration" requirement if no more than $10,000 in cash was taken from the United States by any one person. He was not aware of any "declaration" or "reporting" requirement in connection with his mailing of bearer bonds outside of the United States. He was not aware of any "reporting" requirement until he was indicted.

ARGUMENT

For purposes of 28 U.S.C. §2255, Goulding remains in federal custody, under district court sentence and his freedom is substantially impaired. 28 U.S.C. §2241(3)(A) requires that before "a second ... application [is filed], the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Goulding petitioned the Seventh Circuit, seeking an order authorizing the district court to consider the application. Except as otherwise specified, the information and evidentiary materials described therein were learned or secured since the denial of the original petition.

I. Circuit Court Rule 22.2(a)(1)(B) Compliance - Goulding Exercised Due Diligence in Discovering the Frauds on the Court, *e.g.* the Newly Discovered Evidence -- Withheld, Concealed and Compromised by Government Agents.

Pursuant to Circuit Court Rule 22.2(a)(1)(B), Goulding petitioned the Seventh Circuit to set aside the judgment due to the frauds on the

court or, in the alternative, for authorization to file a second 28 U.S.C. §2255 Petition. The petition's factual predicate and claims included newly discovered evidence *(Brady v. Maryland* materials, 373 U.S. 83 (1963)), learned or secured since the denial of the original petition, were not then known or reasonably susceptible to discovery; they were withheld, secreted and compromised by IRS agents. Such matters were proved by reference to exhibits in the petition, and by independent analysis of the undercover tapes. Due diligence was exercised in securing and presenting this newly discovered evidence. Viewed in light of the evidence as a whole, such facts suffice to establish by clear and convincing evidence that no reasonable factfinder would have found Goulding guilty.[6] Yet, the Seventh Circuit denied relief, refusing to even investigate the IRS compromising of the undercover operation tape recordings.

II. The Newly Discovered Evidence Is Substantial and Warrants the Issuance of Mandamus.

Fabrications, withholding, secreting and compromising evidence undermined the verdict, made a farce of the proceedings, denied due process, warranting relief. Among the more blatant incidents prompted the National Association of Criminal Defense Lawyers, *amicus curiae*,[7] to file a motion on May 27, 1994, for the Seventh Circuit to take judicial notice of a then recent IRS filing of a previously concealed document in an unrelated case. Therein, an

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[6]While this standard is here satisfied, we seriously question the constitutional viability of any rule which precludes an innocent person from reversing an erroneous guilty verdict cultivated by government improprieties, where the evidence is less than "clear and convincing that no reasonable factfinder would have found the defendant guilty." When government impropriety deprives one of a fair trial, entitlement to a new trial should not be so burdensome. Otherwise, it would be rare to ever overcome the effects of government illegality. This is particularly true given certain court's propensity to avoid embarrassing the government.

[7]Two *amici curiae* filed briefs before the Seventh Circuit in the original appeal. Both concluded that evidence existed supporting Goulding's contention of IRS vindictiveness, entitling him to discovery. After initially granting discovery, the trial court reversed its position. The Court of Appeals upheld the denial of discovery, ignoring the abundant IRS misconduct. Since that time, much more evidence, previously concealed by the IRS, has been uncovered.

IRS agent (a defendant in Goulding's civil rights suit) admitted that he and other agents surreptitiously contacted Goulding's clients, making special offers to induce them to terminate Goulding as their attorney. Appendix G. The *amicus curiae* thus brought to the Appellate Court's attention the IRS concealment facilitating the Appellate Court's erroneous conclusion in the civil rights action: *Goulding v. Feinglass*, 811 F.2d 1099, 1104 (7th Cir.1987), cited in *US v. Goulding*, 26 F 3d 656, at 662:

> "that the agents [sued by Goulding] were merely fulfilling their duties in investigating potentially abusive tax schemes [and that] that the evidence of Goulding's claim of vindictive and outrageous government conduct was flimsy and meager."

By contrast, the Feinglass interview (Appendix G, paragraph 8):

> Agent Feinglass told . . . Ben Rosenberg, that the IRS would accept a cash settlement from him, but only if he supplied the IRS with information and discharged Randall Goulding as his attorney. This was done per the instructions of IRS legal council [sic], Lauren Gore and Bill Sabin.[8]

The IRS concealed this interview (and perhaps others), which corroborates Goulding's allegations of misconduct and vindictiveness on the part of the agents, who apparently instigated the criminal investigation. This evidence could have been used as a fertile ground for cross examination of government witnesses. Evidence of a co-worker's bias is relevant.

Twelve days following this admission, on January 30, 1985, IRS District Director J.R. Starkey *falsely asserted*:

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[8]The Seventh Circuit took judicial notice this document, filed by the IRS in the case of *Drobny v. Commissioner*, 86 TC 1326 (1986), wherein *Drobny* attempted, unsuccessfully, to reopen such case due to IRS frauds on the court, including by the same IRS Agent, Irving Feinglass, who Goulding sued and who was instrumental in referring Goulding for criminal investigation.

(a) that Goulding's "allegations are not supported"; (b) that after a "thorough" investigation it was "determined that the Revenue Agents involved were acting in an appropriate manner and that there was no reason for reassignment of the cases"; (c) there was "no indication of a lack of professionalism"; (d) that "after considering the facts presented [the District Director found that] no conflict or misconduct on the part of the Revenue Agents Dietz and Feinglass exist[ed]."

Besides being false, this IRS District Director letter, was used in *Goulding v. Feinglass, supra,* to falsely demonstrate the IRS's good faith. This letter and the concealment of the *Feinglass* interview (and perhaps others) were the *sine qua non* of the grant of summary judgment in *Goulding v. Feinglass, supra,* and in granting the government's motion *in limine* in this case. The combination perpetrated a fraud on the court in both cases.

Other more recently discovered IRS misconduct includes:

(a) IRS agents tampered with the undercover operation tape recordings. These tapes were the *sine qua non* of the conviction. IRS agents selectively eliminated exculpatory evidence from the tapes resulting in Goulding's wrongful conviction. Appendix E.

(b) The IRS improperly withheld at least one interview of Goulding. The interview evidences his lack of the requisite knowledge to convict on Counts 17 and 18. Even more egregious - the IRS then specifically designed the undercover operation to exploit Goulding's lack of such knowledge. By design, the undercover operation became a trap for the unwary innocent.

(c) IRS Agents conducted illegal "electronic surveillance[s] of Goulding's conversations," before any criminal investigation; further evidencing government vindictiveness.

There is now more evidence that the mysteriously missing yellow sheet of paper which the IRS alleges to have lost, never existed. In all the IRS's documents (since disclosed in partial compliance with

the *Freedom of Information Act* suit, 94 C 5113), the very first reference to this critical document occurred shortly before trial, long after all the interviews, document reviews, memoranda, affidavits, etc. by government personnel. It is now more evident that this document never existed but was a mere figment of the prosecution's imagination; its creation occurred only once needed, only shortly after the *Jacobson* case was argued, 503 U.S. 540 (1992), clarifying the government's need for such evidence of predisposition.

The issues raised herein, are constitutional -- Sixth Amendment right to have and to present defense evidence (withheld and secreted by the government), Fifth Amendment due process and *Brady v. Maryland*, 373 U.S. 83 (1963) and First Amendment right to speak out against illegality without fear of IRS reprisal. Actual prejudice resulted from the IRS's concealment and selective compromising evidence favorable to the defense.

A. IRS Employees Tampered with the Tape Recordings of the Undercover Operation, Destroying Exculpatory Evidence. Thomas Danley, Audio Engineer, determined that the tapes used to secure the conviction, were apparently the subject of tampering. He examined the video and audio tapes, with a Digital Signal Processing (DSP) card and Hyperception, a sophisticated sound analysis program. This technology was developed only within the past few years - since the trial. The examination uncovered several anomalies in the very tapes which the IRS agents characterized in their testimony as involving "accidental" erasures and an "accidental" failure to turn on the tape recorder. Mr. Danley identified three distinct patterns or indicia of tampering on those tapes, however, including: background noise level changes, instances of "dropouts," and instances of fundamental output characteristic pattern or feature changes.[9] Mr.

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[9]According to Mr. Danley's Report, "every audio recording device and acoustic environment has its own unique features or 'fingerprints.'" Mr. Danley identified several instances in which "such features or 'fingerprints,' changed during the course of what purported to be a single taping . . . strongly suggest[ing] the tape was made with two different setups, under different circumstances (probably at different locations) and at different times."

Danley's Report (Appendix E) further provides: "Any one of such anomalies would suggest the possibility of 'editing,' 'altering'... in my opinion, with the available information, it does appear that editing and altering occurred."

B. Prejudice Resulted from the Tampering. At least once during the undercover operation, Goulding informed the UCA of his desire that everything be done legally (consistent with Mr. Ushijima's testimony). This exculpatory statement, however, was excluded from the tapes submitted into evidence.

C. In addition to Evidence Tampering, the Government Withheld Critical Evidence: 1. The Withheld Criminal Investigation Referral Report Discloses an Interview of Goulding, Strongly Suggesting That Goulding Was <u>Not</u> Aware of the Filing Requirement. Goulding Lacked the Requisite Knowledge for Conviction under 31 U.S.C. §§ 5316 and 5322 (Counts 17 and 18). The criminal investigation referral reports an interview of Goulding candidly "stat[ing] that he [had once deposited] amounts to a ... Cayman Island Account *in currency*." Yet, no form 4970 was filed. Such a statement to an IRS agent, is compelling evidence that Goulding was unaware of this form 4970 filing requirement. This interview, which the IRS concealed until long after the trial, was incongruous with the prosecution's trial theory, its briefs, and the requisite knowledge element for conviction. With this evidence, a reasonable juror would have concluded that Goulding was unaware of the requisite filing requirement.[10]

2. Abuse of the Criminal Process - *Even More Egregious*

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[10]It is improper after interviewing Goulding and learning of his lack of knowledge, to not inform him of this filing requirement (consistent with the law enforcement objective of assuring compliance). To instead conduct a sting operation to exploit Goulding's ignorance of this reporting requirement is an abuse of process. And to so enlist the aid and assistance of the US Attorney's office and the federal courts should be condemned. This evidences agent bias. Such evidence could have explained why agents lied at trial, and why IRS agents manufactured the mysteriously missing yellow sheet of paper which the agents allege to have lost, but which in fact never existed.

Than the Withholding of Critical Evidence - the IRS Specifically Designed the Undercover Operation to Exploit Goulding's Lack of Such Knowledge.

Not only did the IRS conceal Goulding's lack of knowledge of this reporting requirement, but far more egregious - agents specifically designed the undercover operation to exploit his lack of knowledge. This misconduct is a particularly egregious form of entrapment. At a minimum, the prosecution unjustly precluded Goulding from arguing to the jury this evidence of his lack of requisite knowledge. The investigation was not designed to expose existing criminal activity, but to induce Goulding to engage in conduct which, with the selective introduction of evidence, was made to appear as a violation, by illegally preventing the jury from knowing that he was unaware of this reporting requirement.[11]

3. Additional Withheld Critical Evidence included IRS Agents' Vindictive and Illegal Acts; Making Illegal "Electronic Surveillance of Goulding's Conversations," Even Before Any Criminal Investigation.

Far from being "flimsy and meager" (26 F 3d 656, 662), as the IRS misled the Seventh Circuit, the withheld criminal investigation referral report admits to illegal "electronic surveillance of Goulding's conversations," before any criminal investigation.[12]

4. Additional Withheld Critical Evidence included That the Mysteriously Missing Yellow Sheet of Paper Which the Government Alleges to Have Lost, in Fact Never Existed; it Was

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[11]The original §2255 petition urged that Goulding had no knowledge of the requisite Reporting Requirement. In October 1992, O'Hare Airport Commissioner, James Chronnis, stated that in March 1987 (the time of the transportation), O'Hare Airport, including in the Eastern Airlines terminals from which Goulding departed, had no signs advising a traveler what to do if carrying or mailing monetary instruments. The IRS breached its duty to bring the *reporting requirements* to Goulding's attention before prosecuting. *U.S. v. Granda*, 565 F.2d 922 at 924 (5th Cir. 1978), cited with approval in *Ratzlaf v. U.S.*, 510 U.S. 135 (1994).

[12]Acknowledging the wrongfulness of their conduct in secretly recording Goulding's conversations, the previously concealed IRS Report of this matter refers to the resultant "evidentiary problems" from such activities.

Merely a Prosecutorial Creation.

Evidence now abounds that the mysteriously missing yellow paper which the IRS alleges it lost, never existed. This flow chart, the cornerstone of the government's theory of predisposition and intent, served as the basis for initiating the sting operation. We now know, however, among all the IRS documents (disclosed in a recent *Freedom of Information Act* suit), the very first reference to this document occurred long after the sting operation, all the interviews, document reviews, memoranda, notes, affidavits, etc., by IRS personnel. It was created years later, only once it was needed, after the *Jacobson* case was argued before the Supreme Court, clarifying the need for such evidence of predisposition. It was not previously mentioned: to the grand jury, in the case agent's affidavit opposing, or otherwise in response to the Motion to Dismiss, in justification of the sting operation, in response to the Howard Emirhanian Affidavit, contesting any justification for a sting operation, in the case agent's notes of his interview of Evegelatos (the informant, who had allegedly secured from Goulding, this non-existent document), in any of the memoranda of the interviews of, or in any statement from Evegelatos (at least until December 16, 1991, in preparation for trial), years after the document was allegedly secured.

Mysteriously, this alleged flow chart "disappeared" before trial. The agents claim they "lost" it; Goulding vehemently denies it ever existed. But why would agents lie? The answer would have been obvious to the jury -- *if* the defense had been allowed to make the jury aware of the continuing IRS vindictiveness, much of which evidence was concealed and some even destroyed by IRS agents, and the existence of which they falsely denied.

Knowing that the UCA's comments were being secretly recorded to be played for the jury, the UCA asked Goulding on seven separate occasions, about his "problems with the IRS." Thus, the government purposely, falsely portrayed him before the jury as someone whom the IRS had investigated, or charged with prior wrongdoing; unfairly suggesting to the jury non-existent prior bad acts or other crimes, where it was really the government itself that should have borne the adverse taint. The prejudicial effect was enhanced by denying

Goulding an opportunity for rebuttal or even explanation, granting the prosecution's motion *in limine*. This was central to the IRS' position that Goulding knew he was acting illegally (*mens rea*). "Evidence of other bad acts can be very prejudicial" and was determined to be "plain error" in *U.S. v. DeGerratto*, 876 F.2d 576 (7th Cir. 1989), where the court failed to give a limiting instruction. Moreover, the trial court gave its imprimatur *via*. Gov. Inst. No. 49, ¶3, falsely instructing the jury that the investigation was proper. Given the newly discovered evidence, Gov. Inst. No. 49, was inaccurate and improper. Even worse, the prosecution fostered this erroneous instruction by withholding evidence of its inaccuracy and impropriety. This prevented a fair trial and was a fraud on the court.

It is now clear that the defense was highly prejudiced by this denial of an opportunity to explain: (1) witness bias; (2) that the IRS and its agents acted vindictively and illegally toward Goulding, including by conducting illegal "electronic surveillance of Goulding's conversations," even before any criminal investigation; (3) that IRS employees tampered with the tape recordings of the undercover operation, destroying the exculpatory evidence; (4) that the IRS withheld evidence; (5) the IRS' mischaracterizations of Goulding; (6) that his "problems with the IRS" did not exist, and certainly were not evidence of predisposition. Clearly now, given the newly discovered, previously concealed and destroyed evidence, Goulding was denied his Sixth Amendment right to confrontation and his concomitant due process/fair trial right.[13]

III. ***Previously Known Information and Analysis of the Prejudicial Effect of Withheld, Concealed and Destroyed Evidence, Given the Trial Court's Prohibition of Evidence Concerning Bias of Agents Who Testified, Cumulatively, Clearly Demonstrate the Wrongfulness of the Conviction.***

To place in perspective the new evidence of IRS misconduct, This Honorable Court should consider the evidence previously disclosed in the original §2255 petition and the related Petition for *Certiorari*.

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[13]In addition, the foregoing evidence of government misconduct, if available to the defense, would have facilitated pursuit of the entrapment defense.

IRS abuses following Goulding's Civil Rights Action, include: (1) the vindictive instigation of a criminal investigation, undercover operation and prosecution against Goulding, and a criminal investigation against several of his relatives, business associates, and civil rights attorneys, (2) offers of special inducements to Goulding's clients to terminate him, as their attorney (Appendix G), (3) filing false affidavits and obstruction of Congress by the IRS District Director, and (4) a series of cover-ups of illegal IRS activities.[14]

Agents thus secured erroneous conclusions from the District Court, the Seventh Circuit and the jury. As gleaned from recent congressional hearings on IRS abuse, these are not isolated instances of over-zealous IRS conduct. Retaliatory practices are commonly perpetrated against other members of the community who zealously practice their profession on behalf of clients. Far from "flimsy and meager" (*US v. Goulding*, 26 F 3d 656, at 662), there is now "some evidence" and a "colorable basis" for the claim of vindictiveness, as found by the trial court. At stake is Goulding's freedom and no rational basis has been demonstrated for withholding such evidence. Discovery previously ordered by the Magistrate should now be permitted, as well as an analysis of the tapes.

"There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '[t]he criminal is to go free because the constable has blundered.' *People v. Defore*, 242 NY [12], at 21, 150 NE [585], at 587 [(1926)]. In some cases this will undoubtedly be the result. But, as was said in *Elkins [v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669 (1960)], '*there is another consideration--the imperative of judicial integrity*.' 364 US, at 222. [Emphasis added.] The criminal goes free, if he must, but it is the law that sets him free. *Nothing can destroy a government more*

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[14]In 1985, IRS District Director J.R. Starkey lied to Congressman Porter, thus defrauding congress, in his cover up of illegal IRS activities. On April 19, 1994, an IRS attorney courageously disclosed a portion of an internal secret IRS memorandum, revealing an excerpt of a January 18, 1985 interview of IRS Agent Feinglass. See page 11. Similar settlement offers to Goulding's clients were made directly by IRS District Counsel Loren Gore.

quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v United States*, 277 US 438, 485, 72 L Ed 944, 959... (1928): '*Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.... IF THE GOVERNMENT BECOMES A LAWBREAKER; IT BREEDS CONTEMPT FOR LAW; IT INVITES EVERY MAN TO BECOME A LAW UNTO HIMSELF; IT INVITES ANARCHY.*'" Justice Clark, in Mapp v. Ohio, 367 U.S. 643 at 659, 6 L.Ed.2d at 1092 (1961). (Emphasis added.)

In evaluating the merits of these claims and the importance, I beseech Your Honors to keep an open mind to the harsh realities of life, including that government officials, in all their zeal, sometimes lie and break the law they are sworn to uphold.[15] This Court emphasizes that among the most important functions of the judicial system is to make plain to litigants and society at large that justice is done in our courts. *Offutt v. United States*, 348 U.S. 11, 14, 99 L.Ed. 11 (1954) ("Justice must satisfy the appearance of justice."); *Adams v. United States ex rel McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942) ("The public conscience must be satisfied that fairness dominates the administration of justice.")

IV. Goulding's Conduct for Which He Was Prosecuted Was Not Clearly Wrongful - His Activities Were Consistent with That of

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[15] *United States v. Cortina*, 630 F.2d 1207 (7 Cir. 1980) (affirming a District Court's ruling resting on outright disbelief of a law enforcement officer); *United States v. Freymuller*, 571 F.Supp. 61, 67 (N.D. Ill. 1983) (District Judge disbelieving police officers, allowing a motion to suppress); the infamous *El Rukn* cases - *United States v. Boyd, et al.*, No. 89 CR 908, N.D. Ill., E.D., Sept. 21, 1993 and the lack of any prosecution of Hogan, and *United States v. Burnside, et al.*, No. 89 CR 909, N.D. Ill., E.D., June 4, 1993; the apparent perjury [and demonstration of past illegal evidence planting by Mark Fuhrman, the reputation of whom may have saved O.J. Simpson, regardless of guilt or innocence]; the proof (not speculation, but proof) of the Philadelphia police department, leading to judicial remedies for injured parties; the Waco hearings; hearings on the Ruby Ridge incident and the Orlando Cruz incident; the radiation experiments on unwitting US citizens; the sterilizations in the Lynchburg Colony; the LSD experiments; the Tuskegee Syphilis Experiment, using human beings as laboratory animals.

an Attorney Properly Preserving His Client's Confidentiality. In addition to being improperly motivated, the government's theory of the alleged crime is frightening. Goulding's "crime" was depriving the IRS of confidential information, information relating to a *client* - the UCA, information which he had no duty to disclose, but a duty to safeguard - information about the *client*'s past criminal act which the UCA confessed to Goulding. When the UCA indicated a legitimate business activity in the future, Goulding advised him (on six separate occasions, on tape) to file amended returns and to pay the tax. He refused. Goulding then recommended incorporation and capitalization in a jurisdiction which would preserve his confidentiality. Goulding consistently advised the UCA to file returns where required and to comply with the law.

This was, at least arguably, a proper measure of a lawyer, to preserve client confidentiality and to facilitate the client's ability to operate in a manner which preserved the confidentiality of his *past* criminal act. And so was the belief of the lawyer who Goulding hired as a precaution. The government's theory - by designing a client's affairs in a manner which lessens the likelihood of detection as to his past criminal act, without any misrepresentations or other criminal act, Goulding "defrauded" the IRS (out of confidential and even privileged information), violating 18 USC §§371 and 1341.[16]

Most importantly, Goulding is innocent! The Seventh Circuit should have granted the 28 U.S.C. §2255 Petition, or at least a hearing. Yet, the Seventh Circuit continues to permit the government to withhold *Brady* materials, evidence of IRS misconduct and of agents tampering with evidence, resulting in the wrongful conviction.

V. Justice Cummings' third-party, extra-judicial, extra-record contacts. The Senior Panel member in the original appeal, engaged

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[16]That this could be construed as a crime, given the conflicts Goulding faced, prompted a National Association of Criminal Defense Lawyers *Amicus Curiae* brief, on direct appeal, before the Seventh Circuit and in the United States Supreme Court. Such an undercover operation is too susceptible to ensnaring one who intended to act in good faith.

in a series of secret *ex-parte* communications with a non-attorney, third party, regarding this matter. On or about May 26, 1994, Mr. Sheldon Drobny attempted to contact the Seventh Circuit's clerk, having learned of the issuance of the opinion in this case. Mr. Drobny sought information as to how to bring these inaccuracies to the court's attention. Justice Cummings, and not his clerk, answered the telephone and proceeded to discuss with Drobny this new IRS disclosure and the consequent inaccuracies of the Seventh Circuit's opinion. During the conversation, Justice Cummings requested Drobny's copy of this document. The same court had taken judicial notice of this document by virtue of the *amicus curiae* motion. Justice Cummings later recontacted Drobny securing additional information. Appendix F. No record was ever made of these, or of any other third party contacts. The prospect of extra-judicial influences prompt concern, given the following disparities:

(a) between the Seventh Circuit's factual conclusions and the actual facts as derived from the record on appeal,

(b) between the statements of the justices during the February 17, 1994 oral arguments and the May 25, 1994 opinion, and

(c) between the May 25, 1994 Seventh Circuit's opinion (on direct appeal) and the *Ratzlaf v. U.S.*, 510 U.S. 135 (1994) opinion.

A. Rug Immunity

The Seventh Circuit's opinions ignore the doctoring of evidence and other illegal IRS activities - "rug immunity," a design to cover-up illegal IRS activities and immunize government officials from the burdens of their illegality. Important legal doctrines are effectively eradicated by this illicit practice. Faced with clear, unequivocal evidence of an IRS conspiracy perpetrating numerous, sinister, illegal acts, the Seventh Circuit punishes not the perpetrators of those acts (IRS agents), but the victims. With the advent of such a corrupt practice, the Seventh Circuit effectively joins the conspiracy. Indeed, its opinions are so imbued with patently false factual conclusions and gross factual inaccuracies, that the only rational explanation is a design to preclude any review by *certiorari*. (See Appendix F.)

B. <u>Gross Factual Inaccuracies comprise the Seventh Circuit's Opinion</u>.

a. At *US v. Goulding*, 26 F 3d 656, 664, that the "corporations [formed by the defendants] had no purpose except to 'clean' [the UCA]'s money." The evidence blatantly contradicts this assertion (also made in the government's brief); the UCA repeatedly expressed a desire to use his cash accumulation "for investments", the purchase of "a bowling alley/bar/restaurant" and "apartments."

(1) At 12/18/86 page 14 of the transcript: "I wanted to buy into a bowling alley/bar/restaurant up in Duluth [or] apartment complexes."
(2) At 12/18/86 page 12: "I've also accumulated some cash over the last couple years that uh, I want to use for investments."
(3) At 2/6/87 p.48,49: "In Duluth...I was looking at some property... It's a bar, restaurant, bowling facility]."
(4) At 2/24/87 p. 27, 28: "[I want to buy] a bowling alley. It's income-producing. We talked about that,...a restaurant/bar/ bowling alley.... I'd own it."
(5) At 5/19/87 p. 42: "We had talked about me getting in to this restaurant up in Duluth. [Discussion continues with the "liquor license".]"
(6) At 5/19/87 p. 43: "Just have the corporation make investments, right?" [to which Goulding responded "it has to pay taxes on its investments."]

Both defendants expressly determined that incorporation was necessary to protect the UCA from personal liability; the UCA expressed legitimate business needs for corporations.[17] This

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[17]Ushijima tells Goulding, at 2/24/87 p. 28, 29:

> A business operation like a bowling alley and, and/or a restaurant have a lot of liabilities connected. You want to isolate that in a company...you don't want that real estate subjected to a guy slipping in a bowling alley or eating bad food.... [To] own and operate a bowling alley/restaurant, wouldn't you incorporate [them] separately? And lease the real estate...to the operations?... You have two separate corporations [Goulding agreeing] maybe three.... That's only <u>good business practice</u>.

erroneous conclusion as to the lack of legitimacy of the corporations and the alleged lack of any business purpose cuts into the heart of the defense and the legitimacy of defendants' actions. As argued before the Seventh Circuit, the IRS sting operation required the defendants to form corporations and to do so in a manner which safeguarded incriminating information as to a past crime by their client, the UCA. The fortuitous consequence of any detriment to the IRS, in the form of lessening its likelihood of detecting the UCA's past crime and perhaps past unreported income, does not transform otherwise legitimate legal services into mail fraud and a conspiracy to defraud the IRS out of information. The defendants had no duty to disclose this information; they had a duty, by virtue of the attorney-client relationship (created by the IRS), to safeguard such information from IRS discovery.

b. That there is "overwhelming evidence" of guilt. The evidence instead demonstrates that both defendants performed otherwise legitimate legal services in order to prevent incriminating disclosures as to their client; they properly protected the client's confidences, albeit in derogation of the IRS's ability to detect a past crime. Observing such confidences does not defraud the IRS. Such conduct is not "inevitably nefarious."[18] The overwhelming evidence

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At 2/24/87 p. 50, Goulding tells the UCA that the business could be "owned by the Cayman corporat[ion which] is actually going to then expend the funds, be it either as a loan to you or a direct acquisition of the property.... Goulding suggested a direct acquisition." The Defendants even took offense to the UCA's suggestions that the corporations were "phony" (2/24/87 p. 49). Ushijima stated at 2/24/87 p. 11: "creating these...instruments or entities [in Grand Cayman] is...perfectly legal and above the table." The bank accounts were obviously needed for such business as well. The promissory notes properly documented the loans. The notes had a repayment obligation, discussed at 2/6/87 p. 46, 48, 49; 2/24/87 p. 20, 27. All were legitimate. Each had a valid business purpose.

[18]The Seventh Circuit Pattern Jury Instruction given in this case, defines "wilfulness" as "an act . . . done voluntarily and intentionally with the purpose of 'avoiding' a known legal duty." This simply fails to comport with *Ratzlaf*, despite the Opinion's contrary assertion at *US v. Goulding*, 26 F 3d, 662. It simply does not suffice for the Seventh Circuit to feel that the defendants "knew the[ir] conduct to be unlawful." This question is instead delegated by the United States Constitution to a properly instructed jury.

demonstrated good faith. See pages 19-20, above.

c. That the defense "fail[ed] to ... object" to the denial of the Reliance on Counsel, Instruction No. 20. *US v. Goulding*, 26 F 3d 656, 664. The objection clearly exhibited disagreement with the trial court's ruling (TR p.1003). Refusing the instruction was plain error.

d. That "there is no evidence that Goulding consulted two other lawyers, Ushijima and Fred Harbecke, before initiating this scheme, or that he made a full report ... of all the facts" to the persons on whom he relied. The record is replete with Goulding's receiving advice from Ushijima and him following that advice. At TR 2/24/87 (p. 4), Goulding tells the UCA: "*I told [Ushijima] the whole scenario.*" At 2/24/87 (p. 6) Goulding tells the UCA "we'll propose it to [Ushijima]," and 2/24/87 (p. 8): "[Ushijima]'s had a lot more experience.... I don't remember that form well enough." Ushijima testified that Goulding twice asked that everything be done legally and that Ushijima said that it would be and that their actions were legal. Goulding took no action before hiring Ushijima.[19]

While the Seventh Circuit determined that a jury could have found that Goulding was not acting in good faith, a properly instructed jury also could have found that he understood his actions to be legal and that he was acting in good faith. Good faith negates wilfulness. Since the jury was not so charged, Goulding was deprived of his defense. *U.S. v. Cheek*, 498 U.S. 192 (1993).

e. That Goulding offered no proof of IRS agent misconduct in support of his Motion to Dismiss and/or for Discovery. Evidence of retaliation is substantial and evidence of agent misconduct is now overwhelming. See pages 10-18 above.

f. That there was no evidence of "a lack of predisposition or

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[19]Despite the Seventh Circuit's contrary assertion, reliance on counsel defense is not restricted to hiring an attorney for one's own purposes. Nor must the full disclosure be made by the defendant himself. Suffice it to say that Ushijima had all the facts; Goulding acted in accordance with his advice.

government inducement." *US v. Goulding*, 26 F 3d 656, 665. In fact, the government first suggested "moving money" (October 29, 1986, p.5). Great reluctance was exhibited to engaging in the IRS induced conduct, particularly, without Goulding first obtaining independent counsel to assure himself of the legality; there was no evidence of any intent to knowingly engage in illegality. The only predisposition was to perform legal services in a manner which avoided improper disclosures. Query, why would the IRS design a sting operation with no clear illegality and no violation of any duty to the IRS, upon a subject who had just sued IRS Agents? This is too susceptible to constituting a device to squelch free speech. The gross disparities between the record and the unfounded, unsupportable factual conclusions made a mockery out of the appellate process and, if left alone, would undermine public confidence in the outcome.[20]

C. The Seventh Circuit's Attitude Underwent a Mysteriously Marked Transformation Between the Time of the Oral Argument and the Opinion.

Distressing are the following disparities between the panel's comments during the February 17, 1994 oral argument and its May 25, 1994 opinion:

a. During the oral argument, Justice Rovner accurately stated that Federal Rule of Criminal Procedure 16(a)(2) does *not* preclude the discovery of the Criminal Investigation Referral Reports sought by Goulding. Yet, the opinion asserts that Rule "16(a)(2) precluded the production of the IRS's Criminal Referral Documents." 26 F 3d 656, 662. Effectively, the Seventh Circuit has ruled that Rule 16 supersedes *Brady v. Maryland*, 373 U.S. 83 (1963), after first properly recognizing otherwise during oral argument.

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[20]The outcome of most criminal matters and the likelihood of review are fact driven. We fear that the Seventh Circuit, by misstating the facts, makes matters less appealable, lessens the likelihood of *review* and thus lessens the possibility of a reversal. Apparently, the court repeatedly reached unsupportable *factual* conclusions in order to avoid review for incorrect legal conclusions, *e.g.*, criminalizing the performance of legitimate legal services in a manner which properly prevents incriminating disclosures as to a client's past crime.

b. Next, while the May 25, 1994 opinion does not once mention the government's failure to call an expert witness, both Justices Rovner and Kanne thoroughly questioned the prosecution, stating more than once that they were "deeply troubled" by its failure to call an expert witness as to the proper conduct of an attorney faced with the ambiguous circumstances into which the defendants were thrust. Justice Kanne commented that this "left the jury out to sea."

c. During oral argument, the court questioned the proximity between the civil rights suit and the subsequent initiation of the criminal investigation. Yet, the opinion fails to reflect the court's own inquiry and discredits the notion, concluding that there was no IRS misconduct (26 F 3d at 662). The misconduct is now indisputable.

d. The court, during oral argument, also thoroughly discredited the prosecution's theory as to several mailings and the applicability of the mail fraud statute, several occasions, expressing utter dismay at the prosecution's contention that an attorney's invoice, as well as certain other mailings, could be "in furtherance" of any scheme to defraud. Yet, again, the opinion fails to comport with the judicial remarks and questioning during oral arguments.

D. The Opinion is in Disharmony with *Ratzlaf*.

The trial court gave Government Instruction No. 38: "an act is done wilfully if done voluntarily and intentionally with the purpose of *avoiding* a know[n] legal duty." The Seventh Circuit determined that this "use of 'avoiding' ... comported with *Ratzlaf* (510 U.S. 135 (1994)) and also with the Seventh Circuit's Pattern Jury Instruction." This is in stark contrast with this Honorable Court's specific wilfulness requirement that the defendant know of the illegality of his conduct and harbor a specific intent to commit the crime or a purpose to disobey the law. See also *U.S. v. Rogers*, 18 F 3d 421 (4th Cir. 1994); and *U.S. v. Curran*, 20 F.3d 560 (3d Cir. 1994).[21]

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[21]The court effectively suggested that another jury instruction (No. 22) cured any defect in the instruction. However, that instruction required conviction for what was clearly not a violation per *U.S. v. Granda*, 565 F.2d 922 (5th Cir. 1978), cited in *Ratzlaf* with approval.

E. The Seventh Circuit's Opinions Were Arbitrary and Capricious. The Seventh Circuit clearly failed to give fair and appropriate consideration of either appeal, or the Circuit Court Rule 22.2(a)(1) petition. We are aware of only one series of third party contacts by Justice Cummings. Yet, the process was marred by irregularities, the total divergence between the Justices' statements during closing arguments on February 17, 1994 and the May 25, 1994 opinion, the gross disparities between the evidence and many of the conclusions, a total divergence with the *Ratzlaf* decision and an utter failure to even inquire into the apparent IRS evidence tampering. These factors prompt us to seek discovery as to other possible third-party contacts and irregularities in the Seventh Circuit's conduct.

CONCLUSION

The issue should not be whether a panel of three feels that the evidence introduced at trial is overwhelming as to guilt, but whether the wrongfully withheld evidence may be sufficient to alter the outcome, particularly when the underlying judgment was the product of multiple frauds.

The Seventh Circuit has permitted itself to be the proverbial rug under which the government may freely sweep its dirt. Such refusal to address this clear evidence of IRS misconduct is what we term "rug immunity," whereby the Seventh Circuit protects illicit government conduct by sweeping it under the rug, not dissimilar to how the agents have handled the evidence. It stands as perhaps the most astounding phenomenon in this entire case that despite how outrageous the IRS conduct and despite the fact that much of the foregoing has been overwhelmingly demonstrated and in many cases admitted by agents - there is not one mention of any of these outrageous abuses in any of the Seventh Circuit's opinions. Instead of its conscience being shocked, capriciously, these matters have

been swept under the rug, never to be considered.[22]

Any law abiding, self-respecting law enforcement official faced with the prospects of such IRS illegality as here occurred, given the evidence, would, at the very least, investigate. Indeed, the very fact that no one has even investigated, instead content to cover-up the apparent illegality, including doctoring of evidence, is itself yet further proof of the IRS's *modus operandi* in the instant case; not to investigate real crime (the criminality of which here rests exclusively in the conduct of IRS agents). Instead of pursuing real crime, the IRS has endeavored to manufacture the appearance of crime, to retaliate for Goulding having been so bold as to sue IRS agents for his exercise of First Amendment rights.

Such an abdication of its responsibilities cheats the public out of fair, honest and responsible government. The Seventh Circuit's refusal to deal with the issues of this case and refusal to correctly portray the facts of this case not only threatens the integrity of its actions but threatens to undermine the entire judicial process and to emasculate the federal criminal system.

The criminal investigation (the sting) and the prosecution would not have occurred but for defendant's civil rights suit; nor does the government contended otherwise. The Seventh Circuit adopted a shallow and unreasoned limitation to the Fifth Amendment's prohibition against *government* vindictiveness, limiting the constitutional protection (if any remains in this Circuit), to *prosecutorial* vindictiveness. Yet, the purpose of such a rule is avoid governmental undermining of the constitutional protection. If a prosecution would not have occurred but for such retaliation, at whatever level the retaliation occurred, citizens will feel constrained to avoid such constitutional exercise. The constitutional right thus loses its efficacy. With the new evidence, particularly coupled with

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[22]Worse yet, the jury was deprived of this information, secreted by the IRS, not furnished to the defense. Additionally, the outrageous government conduct became the subject matter of a motion *limine*, precluding any defense reference to government illegality in any defense argument or questioning.

the other indicia of good faith, including the numerous admonitions by Goulding that the undercover agent comply with the law, Goulding would not have been convicted. He was denied a fair trial.

For the reasons stated herein, it is respectively requested that this Court issue a writ of mandamus for the lower courts to determine that the trial was a nullity, and vacate the sentence and judgment and dismiss the indictment or order a new trial, and/or require that the district court conduct an evidentiary hearing on defendant's substantial allegations of constitutional deprivation, and/or issue an order or a mandamus requiring the government to turn over: complete copies of all criminal investigation referral reports pertaining to Goulding, all memoranda of interviews of IRS Agents Dietz and Feinglass and any other documents generated by either IRS Agents Dietz and Feinglass pertaining to Goulding, the originals of the tapes of the undercover operations for independent examination and all documents and materials pertaining to "electronic surveillance of Goulding's conversations."

Respectfully submitted,

RANDALL S. GOULDING, *pro se*
3000 Dundee Rd. Suite 105, Northbrook, IL 60062
(847) 291-4200

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted September 16, 1998

Decided October 13, 1998

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

RANDALL S. GOULDING,

Petitioner,

No.98.9104 v.

UNITED STATES OF AMERICA,
Respondent.

On Motion for an Order Authorizing the District Court to Entertain a Successive Petition for Collateral Review

ORDER

Randall S. Goulding has filed an application for leave to file a successive 28 U.S.C. § 2255 motion. He claims that he has evidence,

discovered after the denial of his first § 2255 motion, that is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty. Goulding's "newly discovered evidence" is simply another attempt to support his general claims that the government's prosecution of him was vindictive and in retaliation for a prior conflict with the Internal Revenue Service and that the government withheld exculpatory evidence from him. Goulding made similar claims on both direct appeal and in his first § 2255 motion. Goulding's present claims are merely the repetition of old rejected claims that he attempts to support with new evidence. *See Bennett* v. *United States,* 119 F.3d 470, 471 - 72 (7th Cir. 1997); 28 USC § 2244(b)(1). Even if we were to consider the claims that Goulding seeks to raise as new claims, the "newly discovered evidence" Goulding seeks to present does not establish by clear and convincing evidence that no reasonable factfinder would have found him guilty. Instead, as this court noted on direct appeal, the evidence against Goulding was "overwhelming." *United States* v. *Goulding,* 26 F.3d 656, 663 (7th Cir. 1994).

Accordingly, Goulding's application for leave to file a successive § *2255* motion is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted November 30, 1998

Decided December 11, 1998

By the Court:

RANDALL S. GOULDING,

Petitioner,

On Motion for Reconsideration

No.98.9104 v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

Randall S. Goulding has filed a petition for rehearing. Goulding seeks reconsideration of the court's decision denying his motion for leave to file a second or successive motion pursuant to 28 U.S.C. § 2255. 28 U.S.C. § 2244(b)(3), however, provides that "the grant or denial of an authorization by the court of appeals to file second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Accordingly, this court is not authorized to consider Goulding's petition for rehearing, which shall be filed in without further action by the court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(Argued March 29, 1996)

Decided August 2, 1996

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

RANDALL S. GOULDING,	]	Appeal from the United States
	]	District Court for the
Petitioner-Appellant,	]	Northern District of Illinois,
	]	Eastern Division,
No. 95-1368 v.	]	No. 93 C 2637
	]	
UNITED STATES OF AMERICA,	]	James B. Moran, *Judge*
	]	
Respondent-Appellee.	]	

ORDER

Randall Goulding was charged in 1991 in an 18-count indictment with conspiracy to defraud the United States, mail fraud, and illegal

transportation of currency and monetary instruments, in violation of 18 U.S.C. §§ 371 and 1341, and 31 U.S.C. §§ 5316(a) and 5322(a). After a jury found him guilty, on all counts. Goulding was sentenced on October 15, 1992 to six months' incarceration on Count 1 and five years' probation on Counts 2 through 18. He was also sentenced to make restitution of $8,000 to the United States and to perform 500 hours of community service.

This court decided Goulding's direct appeal on March 25, 1994. See *United States v. Goulding,* 26 F.3d 656 (7th Cir. 1994), It held, in pertinent part, that (1) Goulding failed to demonstrate that the government had acted selectively or vindictively in prosecuting him, (2) the district court correctly held that Federal Rule of Criminal Procedure 16(a)(2) precluded the production of the IRS's criminal referral documents, and thus that the court did not err in denying Goulding's discovery request for the production of those documents, and (3) Goulding waived his objection to the failure of the district court to give a particular instruction to the jury both because he failed to object below and because the instruction in question was not supported by the evidence.

On September 14, 1994, Goulding filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. His petition asserted five basic grounds for relief: ineffective assistance of counsel, deprivation of his constitutional right to testify, improper denial of access to criminal investigation reports, lack of evidence for Counts 17 and 18 that he had the requisite knowledge to support a conviction, and the invalidity of the conviction because the prosecution was vindictive. Without holding an evidential hearing, the district court denied the petition in an order dated December 5,

1995. It held that there was no basis for a conclusion that the prosecution was vindictive, that the government did not impermissibly limit discovery by refusing to provide Goulding with a copy of the criminal referral, and that Goulding was not denied effective assistance of counsel (either because of a failure to object to a jury instruction or because of a failure to recommend that Goulding testify). On appeal to this court, Goulding raises a host of issues, some of which relate to the merits of his § 2255 petition and others of which relate to the district court's refusal to hold an evidentiary hearing. Some of these issues, as we note below, were resolved against Goulding in his direct appeal to this court, and may therefore not be re-litigated in the guise of a motion under § 2255 absent a showing of good cause for and prejudice from his failure to appeal. *Melvin v. United States*, 78 F.3d 327,329 (7th Cir. 1996); *Patel v. United States*, 19 F.3d 1231, 1237 (7th Cir. 1994). In broad terms, Goulding claims that he has new evidence of vindictive prosecution, which shows that his constitutional right to due process has been violated both by outrageous government misconduct and violations of *Brady v. Maryland*, 373 U.S. 83 (1963). Second, he reiterates his claim that he was denied effective assistance of counsel in a variety of respects, principally by counsel's improper "refusal" to allow him to testify and by counsel's decisions on jury instructions. Finally, he claims that he should have been granted an evidentiary hearing, because disputed issues of fact existed on his allegations. We consider these points in turn.

This court considered Goulding's claim of "invidious, retaliatory prosecution" in the direct appeal from his conviction and rejected it. It is true that the Fifth Amendment prohibits the government from prosecuting a defendant because of some specific animus or ill will

on the prosecutor's part or to punish the defendant for exercising a legally protected statutory, or constitutional *right. See United States v. Goodwin,* 457 U.S. 368, 372 (1992). Nevertheless, in *Goulding,* we held that Goulding failed to demonstrate that the government acted selectively or vindictively in its actions. In order to prevail on a claim of selective prosecution, he would have had to show that the Internal Revenue Service's criminal investigation of him had both a discriminatory purpose and a discriminatory effect. 26 F.3d at 662. In order to show, vindictive prosecution, he would have had to show that he was prosecuted to punish him for exercising a protected right. Id. This court carefully considered and rejected both claims, writing:

> even if Goulding could convince this Court that Agents Dietz and Feinglass harbored ill will towards Goulding, Goulding failed to demonstrate that these agents had any influence on the bringing of this prosecution. In fact, it is clear the agents were not involved in the decisions to begin a criminal prosecution or to prosecute--Goulding, however, makes no claim that the prosecutors who actually made the decision to bring charges against him acted vindictively. Furthermore, Goulding made no showing of discriminatory effect (he failed to show, for example, that other similarly situated persons were not prosecuted). Id.

The alleged "new evidence" of vindictiveness that Goulding has brought forward in his § 2255 petition suffers from the same flaw: it does not demonstrate any link between the alleged ill will and vindictiveness of the IRS agents in charge of the criminal tax investigation against Goulding and the prosecutors who initiated and litigated the fraud, currency, and monetary instrument claims here. We reject Goulding's suggestion that we should adopt a theory of

"imputed vindictiveness," pursuant to which the U.S. attorneys should be held responsible for the state of mind of the IRS agents. This is not a case where an investigator working for the U.S. Attorney's office knows of crucial exculpatory information and fails to turn it over, where courts have held that the prosecutor must be held responsible for the acts of its agent. See *Kyles v. Whitley*, 115 S.Ct. *1555*, 1567-1568 (1995); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). There is nothing to indicate that the IRS was acting as an agent of the prosecutors in an unrelated case. and thus we cannot impute its motivations to the prosecuting authority. As for his allegation of outrageous Government conduct, it is enough to note that this court rejected that theory as an independent ground of recovery in *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995). In any event, the "new evidence" is at best cumulative to that already considered by this court. We decline to give Goulding a second bite at the apple on this claim.

Goulding's claim that he was denied effective assistance of counsel by his lawyer's alleged "refusal" to allow him to testify is similarly unpersuasive. Goulding, himself a lawyer, attempts to portray himself as a susceptible individual whose will was somehow overborne by his attorney. He states in his brief that he was not "permitted to testify," and that his attorney made a unilateral decision not to permit [him] to take the stand." Putting the rhetoric to one side, however, the trial record before Judge Moran speaks for itself:

Judge Moran: Mr. Goulding, you understand that you have a right to testify, or not testify.

Goulding: Absolutely. Your Honor.

Judge Moran: And you can get all sorts of advice from your counsel as to whether you should or you shouldn't.

Goulding: And I certainly have.

Judge Moran: But the final decision is up to you.

Goulding: I understand.

Judge Moran: And it is your choice not to testify.

Goulding: I understand.

Judge Moran: And that is your choice.

Goulding: That is my choice, correct.

Judge Moran: Okay.

Goulding offers no evidence to show that he was somehow incapable of responding honestly and knowledgeably to the judge's questions. The general rule is that parties are held to their responses, both in these kinds of exchanges and in Rule 11 colloquies. even if then, later have second thoughts. *See United States v. Messino, 55* F.3d 1241, 1248 (7th Cir. 1995); *United States v. Malave,* 22 F.3d 145, 148 (7th Cir. 1994); *United States v. Cirrincione,* 780 F.2d 620, 624 (7th Cir. 1996) ("A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack.")

Goulding's other assertions of ineffective assistance of counsel are equally, unavailing. In order to prevail on this kind of claim, he must present evidence that his counsel's conduct fell below an objective standard of reasonableness and that his case was prejudiced by his counsel's conduct. *Strickland v. Washington,* 466 U.S. 668 (1984). Here, in addition to the claim about counsel's advice on his right to testify, Goulding asserts that his counsel did not perform a thorough enough investigation, that he failed to submit proper "theory of the

defense" jury instructions (in the face of this court's earlier holding that the evidence in the record did not support the instruction Goulding is still claiming should have been given, see 26 F.3d at 668), and that counsel failed to pay attention at a critical point in the trial, when certain incriminating tapes were being played. Even if we assumed for the sake of argument that the lawyer's decisions were unreasonable (and we see nothing to support such an assumption), Goulding's argument fails on the "prejudice" part of the test. As the panel on direct review has already observed, the evidence against Goulding "was overwhelming." Id. at 663-64. He therefore has not raised a credible ineffective assistance of counsel claim.

In light of the nature of Goulding's claims in the § 2255 petition, the district court did not abuse its discretion in deciding not to hold an evidentiary hearing. A hearing is not required if "the motion and the files and records of the case conclusively show that the prisoner is not entitled to relief." 28 U.S.C. § 2255, ¶3. We agree with Judge Moran that this standard was met.

We therefore AFFIRM the judgment of the district court.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	No. 93 C 2637
	)	No. 91 CR 370-1
RANDALL S. GOULDING,	)	
	)	Judge Moran
Defendant.	)	

Memorandum and Order

DOCKET ENTRY:

Enter Memorandum and Order. Defendant, by a Section 2255 petition, seeks to raise constitutional issues attacking the validity of his conviction. While the reasons advanced are many, they are mostly prior arguments in new packages. The petition is denied.

"s/_____".
JAMES B. MORAN,
Chief Judge, U.S. District Court

DEC 8 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	No. 93 C 2637
	)	No. 91 CR 370-1
RANDALL S. GOULDING,	)	
	)	Judge Moran
Defendant.	)	

MEMORANDUM AND ORDER

Defendant, by a §2255 petition, seeks to raise constitutional issues attacking the validity of his conviction. while the reasons advanced are many, they are mostly prior arguments in new packages. The petition is denied.

The petition alleges that defendant was denied effective assistance of counsel, denied his constitutional right to testify, was improperly denied access to criminal investigation reports, was convicted of counts 17 and 18 despite an absence of evidence that he had the requisite knowledge for conviction, and that additional evidence shows that the prosecution was vindictive. We consider that petition from the perspective of having been the trial judge, of having reviewed the arguments and exhibits of the petitioner and the government, including petitioner's 45-page handwritten reply brief, and being mindful that the Court of Appeals considered and decided numerous issues on appeal. We are also well aware that, as petitioner concedes, in this case "[v]irtually everything is on tape."

We deal with the last issue first. Petitioner contended both in the trial court and the Court of Appeals that the prosecution was vindictive because the conduct of two IRS agents back in the mid-1980s was vindictive and the government would not give him a copy of the

criminal referral. Neither this court nor the Court of Appeals found the argument persuasive and, besides, the Court of Appeals specifically ruled that the production was precluded by Fed.R.Cr.P. 16(a) (2). United States v. Goulding, 26 F.3d 656, 662 (7th Cir. 1993). Petitioner now adds in a hearsay opinion of a former IRS agent, whom he solicited to be (and who could have been, if he had had anything relevant to say) a retained expert, who opined that referral reports are not normally withheld and might be Brady material. He also adds some additional material indicating that one of the IRS agents may have acted improperly in the mid-1980S. Petitioner does not, however, establish any connection between that agent and this prosecution, as pointed out by the Court of Appeals; the government had no obligation to furnish the report unless it was Brady material; and we do not assume that government attorneys disregarded their obligations to furnish Brady material solely because of their resistance to production of the report.

Petitioner also contends that he was denied effective assistance of counsel. Establishing that is a daunting task -- the counsel was of his choosing; that counsel is recognized as one of the most competent criminal defense lawyers in the community; the standard of proof petitioner must meet is high; this court observed that representation throughout the trial; and, given the tapes, petitioner did not give his counsel much to work with. Nevertheless, we will consider petitioner's principal contentions. He argues that his counsel should have objected to this court's failure to give tendered instruction No. 20, while failing to note that the Court of Appeals has ruled that the instruction was not supported by the evidence in the record. Id. at 668. That court has also ruled that the instructions pertaining to reporting requirements were "entirely adequate." Id. at 666. The government's closing argument was permissible. Id. at 667-668. Most of the remaining arguments are little more than nitpicking -counsel did not talk with petitioner as often as petitioner would have liked, he on occasion rejected petitioner's views as to trial tactics, he sometimes did not pursue some line of inquiry as vigorously as petitioner would have preferred.

The last significant bone of contention concerns the petitioner's failure to testify. Petitioner, an attorney (which undoubtedly explains

the extent of his now second-guessing his counsel) , was expressly advised that he had a right to testify or not testify and that the decision was his, and he expressly represented that he did not wish to testify. He now claims that he should be relieved of that waiver because, although he wished to take the stand, he could not because his counsel was unprepared for his testimony. Although his counsel ascribes other reasons, we accept for the purposes of this petition the representation that counsel said he did not have time to prepare adequately to examine petitioner. What he also said, according to petitioner's affidavits, is that petitioner provided too much detail; that "if you ask him what time it is, he will tell you how to build a clock"; that he would not be a good witness; and that counsel could get in what he needed to get in through the co-defendant and argument.

This court has spent a considerable time on this case: pretrial, trial and post-trial. We have observed the petitioner in various circumstances, listened to him, and read whatever he has presented. This court has no question but that preparation of petitioner to testify would have required an incredible effort, and he still would have been a poor witness. As this petition demonstrates, he has his own perception of what is important and his own selective perception of the facts. We need look no further than the argument here that his representation was constitutionally ineffective because his counsel did not push positions that the Court of Appeals had previously ruled are unsupported by the evidence in the record. Four judges (which includes this court) have concluded that proof of guilt was overwhelming. Petitioner has yet to concede he did anything wrong. One with that capacity for rationalizing would be a loose cannon on the witness stand, and an inviting target. We have no reason to disagree with counsels conclusion, much less to term it ineffective assistance. Counsel did the best he could, but he could not surmount the difficulty that petitioner had, on the tapes, convicted himself.

"s/_____".
JAMES B. MORAN,
Chief Judge, U.S. District Court

Dec. 5, 1994.

Report on Randall S. Goulding Tape Acoustical Analysis

I am an Acoustical Engineer. See the attached resume, exhibit 1.

On or about August 18, 1997, I met with Mr. Randall S. Goulding. Mr. Goulding then explained to me that in 1986 and 1987, he was the subject of a federal undercover sting operation. He further explained to me that he had second generation video and audio tapes furnished to him courtesy of the federal government and that he suspected that the government had altered the tapes. Mr. Goulding furnished me with those video and audio tapes for my examination, identified in the attached exhibit 2.

In accordance with Mr. Goulding's request, I have listened to all such audio tapes, several times, with head phones (to aid in hearing acuity). Additionally, I monitored the tapes using my computer, running a Digital Signal Processing (DSP) card and Hyperception, a sophisticated sound analysis program. This technology was invented and made available to technicians only within the past three years. See the attached exhibit 3 describing DSP and Hyperception.

In the course of my examination of the tapes, approximately 65 hours, I found a number of anomalies in two of the tapes: the one labeled "4-16-87 attempts to contact Goulding" and the one labeled "11/11/86 phone conversation with Goulding." I found it interesting that these were the very tapes which Mr. Goulding identified as involving "accidental" erasures and "accidental" failure to turn on the tape recorder. All other tapes appeared normal.

First, I found places in those tapes where the background noise level changed. Second, I found in those same tapes instances of "dropouts." "Dropouts," are instances on the tape where a certain audio process inherent in that tape abruptly stops.

Finally, I identified instances of fundamental output characteristic pattern or feature changes. Every audio recording device and acoustic environment has its own unique features or "fingerprints." Significantly, in certain instances such features or "fingerprints,"

changed during the course of what purported to be a single taping. For example, on the 11/11/86 tape (Spectrogram marked #1), one should recognize a distinctly different sound spectra between the introduction and the actual phone call and a rather abrupt start. The Spectrogram marked #1 illustrates this well and strongly suggests the tape was made with two different setups, under different circumstances (and presumably at different locations) and at different times.

Approximately the first one-third of this Spectrogram is characterized by significantly different features than the balance. Not surprisingly, the different features start mid-sentence as Mr. Goulding's conversation begins with the undercover agent. This markedly different pattern reveals a different setup. First, the average lateral length of the lines in the first one-third of this Spectrogram is less than one-half of those in the rest of the Spectrogram. More significantly, moving horizontally across the bottom of the Spectrogram, another rather abrupt change is evident; all four bands of bright patches disappear at the same spot. Less dramatic, the overall degree of brightness dissipates after the first one-third of this Spectrogram.

The Spectrogram marked #2 (tape from 11/11/86) similarly suggests that the tape was made with two different setups under differing circumstances, separated by the significantly darker area. It would appear that many of the features noted with regard to the first one-third of Spectrogram #1, reappear toward the end of Spectrogram #2 (following the significantly darker area), while the setup for the final two-thirds of Spectrogram #1, appears to be similar to that for the beginning of Spectrogram #2. Additionally, at the end of this conversation, depicted in Spectrogram #2, is an additional voice, cutoff in midstream, saying "memo to...." This also appears to have a different spectra (see Spectrogram #2, I inserted the white line for illustrative purposes), suggesting a different setup.[23]

On Spectrogram # 3, reflecting the April 16, 1987 tape, about ½ inch starting from the left, one can see the normal sonic "tag" left by this

recording machine when it starts and stops. It appears as two spikes with a dark gap in between. Now, locate the vertical white line I inserted as a marker. The marker is actually about 1/8 inch before the actual starting and stopping (due to my reflex time), where the recording cuts into the conversation mid-sentence. One can notice that there is no sonic "tag" here from starting and stopping. This distinction, the presence of a sonic "tag" on the one occasion of starting and stopping, but absent in the next, on what purports to be one continuous taping on the same day with the same equipment, under the same circumstances, in the same environment, is also consistent with editing.

In other words, after the start and prior to the end of the taping process in what purports to be a single taping event, and in the same tapes, I have identified such anomalies as noise level changes, "dropouts," speed changes and fundamental output characteristic pattern or feature changes. The foregoing incidents identified, are typically indicative of a different taping setup, such as a different recording device substituted at such moment, a different recording environment, or both. Any one of such anomalies would suggest the possibility of "editing," "altering"or otherwise compromising the original tape or a prior generation of such tape, from which such tape was created. Without these original tapes, I cannot say with 100% certainty, but in my opinion, with the available information, it does appear that editing and altering occurred.

Finally, I think it is at least "curious" that these agents perform these tasks routinely (in the one tape even calling inter-office each time to confirm that the gear works) and then "forgets" to turn on the machine the only time it is important to do so, when talking to the subject, Mr. Goulding. Then, the very tape which the agent claims to have "forgotten" to turn on the machine when commencing his undercover task, is also the tape bearing these anomalies.

It remains at least a theoretical possibility, although unlikely, that these anomalies could have occurred innocently, in the original recording or in the process of copying to cassette. While each of these sound change anomalies are suggestive of "editing," as indicated

above, I cannot say definitively that at any particular point, it is the result of what would appear to be the result of tampering/editing. On the other hand, if the government is willing to supply me with the original reel to reel tapes, even under their supervision and without their losing control over the original tapes, I could, through the same analysis, determine, with more certainty, whether these sound change anomalies were the consequence of tampering.

This certainty is because there is an inaudible "bias" signal on the original tape which we can extract with the computer. This process would identify the source and confirm if those spots are edits (or for example, the innocent consequence of the process of where the tape recorder started and stopped). The "bias tone" is a high frequency signal that is inaudible. It is recorded along with the "normal" audio signal process while the audio signal is recorded on the tape. It aids in the magnetization process. The signal is inaudible; it is above the range of normal hearing (ultrasonic). When a tape is reproduced, this Bias signal is not transferred as the playback head in the tape recorder cannot normally pick up or record this signal.

With the original of a tape, by playing the tape at a reduced speed, the bias becomes audible. The "normal" audio signal (in this case, the voices) can be filtered out using a high pass filter, leaving only the bias tone available for analysis. At this point, the bias tone, as it is normally a continuous tone, can be used to find starts and stops as well as pauses, as would occur in editing, recording over, etc. A discontinuous bias signal should stand out quite distinctly, using the Hyperception program.

If the government is willing to supply only some of the original tapes, the ones in which I would have most interest would be the one labeled "4-16-87 attempts to contact Goulding" and "11/11/86 phone conversation with Goulding." Unlike DNA testing, the entire process is non-destructive; it would be performed without compromising the original evidence.

Sincerely,

"s/_____".
Thomas Danley

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

CHAMBERS OF
WALTER J. CUMMINGS
CIRCUIT JUDGE
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

May 31, 1994

Mr. Sheldon Drobny
Adler Drobny Fischer, Ltd.
95 Revere Drive - Suite A
Northbrook, Illinois 60062-1585

Re: United States v. Goulding

Dear Mr. Drobny:

Thank you for your helpful letter of May 27, together with its attachments. You may be sure that this material will be considered by the panel.

Sincerely,

"s/_____"
Walter J. Cummings

CC: Honorable S. Kanne
Honorable Ilana Diamond Rovner

UNITED STATES TAX COURT

SHELDON DROBNY AND ANITA DROBNY ,	)	
Petitioners,	)	
v.	)	Docket No.6985-83
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECLARATION OF ROBERT M. RATCHFORD

I, Robert M. Ratchford, hereby swear and affirm, under penalties of perjury that:

1. I am an Attorney admitted to practice before the United States Tax Court.

2. I am employed by the Office of Chief Counsel for the Internal Revenue Service. I am presently a Special Trial Attorney assigned to Regional Counsel, in Chicago, Illinois.

3. On March 8, 1994, the above-named case was assigned to me for defense of the Commissioner of Internal Revenue with respect to petitioners' Rule 12 Motion for Leave to File Motion to Vacate Decision (hereinafter "Motion for Leave").

4. Between March 11, 1994 and March 21, 1994, I interviewed and discussed petitioners' pleadings and respondent's response with Revenue Agent Irving Feinglass, William C. Sabin, Lauren W. Gore, and Harmon B. Dow. At that time of these discussions, our closed tiles with respect to the previous trial in this matter had been requested but not received. In my discussions with Mr. Feinglass, I learned that he

had previously been sued by Mr. Randall Goulding in U.S. District Court. Upon learning that information, I requested that General Legal Services retrieve their closed files with respect to that collateral matter for my use in this case.

5. Subsequent to my discussions with William C. Sabin, Harmon B. Dow, and Lauren W. Gore, I drafted and faxed or delivered to them the Affidavits and Declaration which were subsequently executed and filed as attachments to respondent's Notice of Objection which was sent to the Court for filing on March 22, 1994.

6. At the time that I filed respondent's Notice of Objection and Motion to Strike in this case (March 22, 1994), none of the requested files had been retrieved.

7. Some time around the middle of April 1994, I received a box of closed files with respect to the collateral litigation involving Randall Goulding and Irving Feinglass. This collateral litigation is reported at Goulding v. Feinglass, et al, 811 F.2d 1099 (7th Cir. 1987, cert. denied, 482 U. S. 929 (1987) .

8. On May 12,1994, I began to review the closed collateral files involving the Goulding v. Feinglass litigation. On May 13, 1994, late in the afternoon, I discovered a Report of Investigation by Regional Inspector--Midwest Region. This Report of Investigation contained an interview with Revenue Agent Feinglass by Inspectors Peter McCauley and John Corcoran on January 18, 1985 in Chicago, Illinois. The Memorandum of Interview, in relevant part, contains the following statement:

> "Inspector CORCORAN then asked Revenue Agent FEINGLASS if he ever approached a client of Mr. GOULDING'S just before trial and stated "If I were you, I would not have GOULDING representing me". He replied that he did not say that, but did relate a situation involving a

> tax shelter based on investments research and development of products that contained extracts from the Aloe Vera plant. Prior to the trial, Revenue Agent FEINGLASS told one of the investors I BEN ROSENBERG, that the I.R.S. would accept a cash settlement from him but only if he supplied the I.R.S. with information and discharged RANDALL GOULDING as his attorney. This was done per the instructions of I.R.S. Legal council, LOREN GORE and BILL SABIN. Revenue Agent FEINGLASS believed this occurred sometime in September or October 1984. The offer was declined."

9. On May 13, 1994, my immediate supervisor, James C. Lanning and the Regional Counsel John T. Lyons, were not in the office.

10. First thing Monday morning on May 16, 1994, I brought the above to the immediate attention of my supervisor James C. Lanning.

11. On May 17, 1994, pursuant to directions received from Regional. Counsel John T. Lyons, this matter was referred to the Regional Office of Inspection.

12. On May 17, 1994, Midwest Regional Office of Inspection began their investigation with respect to the allegations made in the 1985 interview by Revenue Agent Feinglass and the statements made in the Affidavits and Declaration submitted with respondent's Notice of Objection in this case.

13. The investigation by the Regional Office of Inspection also includes the Department of Treasury, Inspector General. This

investigation is still open.

Further declarant sayeth not.

_____ "s/_____"
Date Robert M. Ratchford